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No. 99-380

Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

HERBERT MARTELL COLLINS AND
UWANDOLYN BLACKWELL COLLINS,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FACTS OMITTED FROM THE BRIEF IN OPPOSITION 1

REPLY TO FEDERAL GOVERNMENT'S ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

A.H. Robins Co. v. Dieleuterio (In re A.H. Robins), 235 B.R. 406 (Bankr. E.D. Va. 1999) 7

Corey v. White, 457 U.S. 85 (1982) 5

Edelman v. Jordan, 415 U.S. 651 (1974) 2, 3

Gardner v. New Jersey, 329 U.S. 565 (1947) 4

In re Barrett Refining Corp., 221 B.R. 795 (Bankr. W.D. Okla. 1998) 7

In re Platter, 140 F.3d 676 (7th Cir. 1998) 4

In re Thompson, 16 F.3d 576 (4th Cir. 1994) 1

NVR Homes, Inc. v. Maryland, 189 F.3d 442 (4th Cir.), *petition for cert. filed November 8, 1999* (No. 99-792) 4

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) 5

Pennsylvania Dep't of Pub. Welfare v. Davensport, 495 U.S. 552 (1990) 7

Phelps v. Sallie Mae Loan Service Center (In re Phelps), 237 B.R. 527 (Bankr. D.R.I. 1999) 6

Reading Co. v. Brown, 391 U.S. 471 (1968)..... 7

Robertson v. University of Virginia (In re Robertson), 237 B.R. 124 (Bankr. W.D. Va. 1999)..... 6

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 5

Smith v. Psychiatric Hospitals of Fla., Inc., 216 B.R. 660 (M.D. Fla. 1998)..... 7

TABLE OF AUTHORITIES – Continued

Page

Texas v. Walker, 142 F.3d 813 (5th Cir. 1998) 7

Young, Ex parte, 209 U.S. 123 (1908) 4, 5

STATUTES AND RULES

11 U.S.C. § 523(a)(7) 1

11 U.S.C. § 523(a)(8) 6

Bankruptcy Rule 7001(6) 1, 6

REPLY BRIEF OF THE PETITIONER

The Brief in Opposition of the United States is remarkable for what it does not say and for the issues the Federal Government chooses not to address. This Reply Brief is filed pursuant to Rule 15 of the Rules of this Court to respond to the new points raised in the Brief in Opposition.

FACTS OMMITTED FROM THE BRIEF IN OPPOSITION

1. In response to the Collins' Amended Motion to Reopen their Chapter 7 bankruptcy case, the Commonwealth of Virginia ("the State") made "a special appearance . . . for the sole purpose of objecting to the [Collins'] Amended Motion to Reopen." *See* Appendix (App.) to Pet. at 54, 56.

2. The Collins' discharge order only discharged "all debts dischargeable under 11 U.S.C. 523." *See* App. to Pet. at 65. Debts owed to the State as a result of a forfeiture are expressly not dischargeable. *See* 11 U.S.C. § 523(a)(7). Bankruptcy Rule 7001(6) requires that a determination of dischargeability be made through an adversary proceeding.

3. Upon a Motion to Reopen to determine dischargeability filed in a bankruptcy court in the Fourth Circuit, a debtor is required to make a preliminary showing that the debt is likely to be dischargeable. In effect, the issue of dischargeability is previewed although the substance or the merits are not fully litigated at the Motion to Reopen stage. *See e.g., In re Thompson*, 16 F.3d

576, 582 (4th Cir. 1994) ("Since the debt is non-dischargeable, there was no reason for the Bankruptcy Court to reopen the proceedings to determine whether or not the debt should be discharged"). The merits of the Collins' dischargeability claim have not been litigated.

REPLY TO FEDERAL GOVERNMENT'S ARGUMENT

The Federal Government first argues that the Commonwealth has either waived or is estopped from asserting its Eleventh Amendment immunity – an argument specifically rejected by the lower court. Second, after framing the question presented in very broad terms (see p. (I) of Brief in Opp.), the Federal Government asserts "the issue presented is quite narrow and is unlikely to recur in the future." Brief in Opp. at 7. This argument not only ignores recent case developments, it also dismisses out of hand, the concerns expressed in the Brief of the Amici States filed by the Kansas Attorney General and joined by thirty-three (33) other states. Finally, the Federal Government asserts that the Petition does not *allege* "a conflict in the circuits on the question presented in this case"; nonetheless such a conflict exists.

1. This Court has consistently held that "in deciding whether a State has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). A waiver of Eleventh Amendment immunity may be effected by state

statute or constitutional provision, or other express waiver. As this Court has emphasized, a waiver or estoppel requires "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. . . . 'Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . . ' " *Id.* Any suggestion by the Federal Government that the State waived or is estopped from raising its Eleventh Amendment immunity because it failed to raise it upon a limited appearance at the Motion to Reopen stage is unsupportable.

The Federal Government's argument confuses the dischargeability preview that is part of a procedural question of whether to reopen the bankruptcy case, with the separate, substantive determination of dischargeability, to be litigated in an adversarial proceeding. The State appreciated the differences between the two and attempted to address them separately. The United States asserts that "petitioner argues that the motion was transformed into a suit against a State when the Bankruptcy Court issued a decision that the debt . . . was dischargeable. . . . " Brief in Opp. at 5. That is not exactly what the State argued. The Bankruptcy Court improperly ruled on the merits of the Collins' dischargeability claim when the only issue before the Bankruptcy Court was whether the Collins' bankruptcy case should be reopened. As a result, the State was never served with an adversarial claim, never had an opportunity to assert its Eleventh Amendment immunity in the Bankruptcy Court, and was deprived of any opportunity to litigate the merits of the dischargeability issue.

The cases the Federal Government relies upon do not apply to Petitioner. In *Gardner v. New Jersey*, 329 U.S. 565 (1947), the state (New Jersey) filed a proof of claim against the debtor, thereby voluntarily submitting to the jurisdiction of the Bankruptcy Court. Virginia did not file a proof of claim or otherwise submit to the jurisdiction of the Bankruptcy Court for any purpose other than to object to the Motion to Reopen. Similarly, in *In re Platter*, 140 F.3d 676 (7th Cir. 1998), the state initiated an adversary proceeding against the debtor, thereby expressly invoking the jurisdiction of the Bankruptcy Court.

2. The United States asserts that review of this case is unwarranted because the issue presented is "quite narrow and is unlikely to recur in the future." Virginia and thirty-four (34) other States respectfully disagree. In fact, another Petition for Writ of Certiorari currently pending before this Court raises the identical issue – what proceedings in a bankruptcy court constitute a "suit" for Eleventh Amendment purposes. *See NVR Homes, Inc. v. Maryland*, 189 F.3d 442 (4th Cir.), *petition for cert. filed November 8, 1999* (No. 99-792).

The Federal Government admits that the following issues are likely to recur:

1) Whether a Bankruptcy Court would have authority under the Bankruptcy Code to make a decision on dischargeability in the context of a motion to reopen, rather than in an adversary proceeding, when the State has not invited such a determination;

2) Whether a debtor could obtain a determination that a debt owed to a State is dischargeable by filing an action under *Ex parte Young*, 209 U.S. 123 (1908); and

3) Whether a debtor could obtain a dischargeability determination by filing an adversary action against the State under 11 U.S.C. § 106(a).

See Brief in Opp. at 7-8. Virginia's Petition raises these issues for the following reasons:

1) Until this Court speaks to the isssues raised in the Petition, there will always be a question of what conduct (and when the absence of conduct) by a State constitutes an "invitation" to the Bankruptcy Court to decide the merits of the State's claim.

2) *Ex parte Young* clearly should not apply. *See Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996) ("the relief sought by a plaintiff suing a state is irrelevant to the question of whether the suit is barred by the Eleventh Amendment."); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) (a suit nominally against State officials that is, in fact, a suit against a State is barred regardless of whether it seeks damages or injunctive relief); *Corey v. White*, 457 U.S. 85, 91 (1982) (same). Although this issue is not directly raised in the Petition, it would nonetheless be subsumed in any decision by this Court addressing the first issue.

3) Whether a debtor could obtain a dischargeability determination by filing an adversary action against the State is an issue that is clearly part of the "what constitutes a suit in bankruptcy" question raised by the Petition.

Not only are the issues raised in the Petition recurring, bankruptcy courts are reading the lower court decision to create a new exception to the Eleventh Amendment. In *Phelps v. Sallie Mae Loan Service Center (In re Phelps)*, 237 B.R. 527, 534 (Bankr. D.R.I. 1999), the court relied on the lower court decision to find no "suit" for Eleventh Amendment purposes where the governmental entity "is not summoned to appear before this Court [and] was not served with process." In *Robertson v. University of Virginia (In re Robertson)*, 237 B.R. 124 (Bankr. W.D. Va.), the Bankruptcy Court relied on the lower court decision to hold that *all* dischargeability claims are excepted from the Eleventh Amendment. In *Robertson* the debtor filed an adversary proceeding under Bankruptcy Rule 7001(6) to have the discharge of his indebtedness determined pursuant to 11 U.S.C. § 523(a)(8). Notwithstanding the State's assertion of immunity, the Bankruptcy Court reasoned:

> However, the decision in *Collins* carves out an exception to the applicability of *Schlossberg* where discharge is involved. When discharge is at issue, the jurisdictional power of the bankruptcy court derives from control over the debtor and federal supremacy with respect to bankruptcy trumps any Eleventh Amendment claim of immunity by the State. 237 B.R. at 127.

3. The Circuit Courts are divided over what constitutes a "suit" in the bankruptcy context for purposes of the Eleventh Amendment. For example, in *NVR Homes, Inc., supra*, the Fourth Circuit relied upon the lower court's decision to find a debtor's claim barred by the Eleventh Amendment even though the State had not been

served with process and had not participated. This conflicts with *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 865 (1999), where the Fifth Circuit determined that the Eleventh Amendment does not "prevent[ ] the discharge of a debt owed to a State in a bankruptcy proceeding in which the State does not participate . . . ." *Id.* at 820.

District and bankruptcy courts are also divided on the recurring suit question in bankruptcy proceedings. *Compare A.H. Robins Co. v. Dieleuterio (In re A.H. Robins)*, 235 B.R. 406 (Bankr. E.D. Va. 1999) (applying Eleventh Amendment to adversarial action against state officials) *with In re Barrett Refining Corp.*, 221 B.R. 795, 804 (Bankr. W.D. Okla. 1998) (holding a bankruptcy case is not a suit against a State "because a bankruptcy petition does not seek damages against another party . . . there is no opposing party whose property is subject to attachment . . . [and] compulsory process is not issued against an opposing party by the filing of a bankruptcy proceeding.") and *Smith v. Psychiatric Hospitals of Fla., Inc.*, 216 B.R. 660 (M.D. Fla. 1998) (debtor's motion held not to be a suit). This Court has granted certiorari "[t]o address a conflict among Bankruptcy Courts." *See Pennsylvania Dep't of Pub. Welfare v. Davensport*, 495 U.S. 552, 557 (1990). Moreover, the Fourth Circuit's decision that 11 U.S.C. 523(a)(7) does not apply to bail bond forfeitures conflicts with the plain meaning of the statute. *See Reading Co. v. Brown*, 391 U.S. 471, 475 (1968).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA, COMMONWEALTH OF VIRGINIA ex rel. CITY OF NORFOLK, COMMONWEALTH OF VIRGINIA, ex rel. NORFOLK GENERAL DISTRICT COURT

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